Supreme Court, U.S.
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NO: _____

IN THE
Supreme Court of the United States
OCTOBER TERM, 1994

MICHAEL F. BLAKENEY,
Petitioner,

v.

BAKER HUGHES, INC.,
Respondent.

Petition For Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

1. Whether a waiver of ADEA claims which does not meet the minimum statutory requirements of 29 U.S.C.A. §626(f)(1) is void or voidable.

PARTIES TO THE PROCEEDING

In accordance with Rule 29.1 of the Rules of this Court, Petitioner states that there are no persons other than himself or his attorney, or to his knowledge, Respondent, with an interest in the outcome of this case. Petitioner is not aware of the parents, subsidiaries or affiliates of Respondent.

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v.

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Petition For Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

PETITION FOR A WRIT OF CERTIORARI

Petitioners respectfully petition for a writ of certiorari to review the judgment of the court of appeals in this case:

OPINIONS BELOW

1. The court of appeals affirmed the district court's decision without an opinion (App.A-1a). The court of appeals affirmance is reported at 50 F.3d 1032. The opinion of the district court (App.B-3a) is not reported in Federal Supplement.

STATEMENT OF JURISDICTION

The judgment of the court of appeals was entered on March 6, 1995. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

STATUTE INVOLVED

Section 201 of the Older Workers' Benefit Protection Act, 104 Stat. 978, 983-4 (Oct. 16, 1990) ("OWBPA") added a new subsection (f) to the Age Discrimination in Employment Act of 1967 ("ADEA"). This new subsection is codified at 29 U.S.C. §626(f) and reads as follows:

"(f) Waiver

(1) An individual may not waive any right or claim under this chapter unless the waiver is knowing and voluntary. Except as provided in paragraph (2), a waiver may not be considered knowing and voluntary unless at a minimum--

(A) the waiver is part of an agreement between the individual and the employer that is written in a manner calculated to be understood by such individual, or by the average individual eligible to participate;

(B) the waiver specifically refers to rights or claims arising under this chapter;

(C) the individual does not waive rights or claims that may arise after the date the waiver is executed;

(D) the individual waives rights or claims only in exchange for consideration in addition to anything of value to which the individual already is entitled;

BEST AVAILABLE

(E) the individual is advised in writing to consult with an attorney prior to executing the agreement;

(F)(i) the individual is given a period of at least 21 days within which to consider the agreement; or

(ii) if a waiver is requested in connection with an exit incentive or other employment termination program offered to a group or class of employees, the individual is given a period of at least 45 days within which to consider the agreement;

(G) the agreement provides that for a period of at least 7 days following the execution of such agreement, the individual may revoke the agreement, and the agreement shall not become effective or enforceable until the revocation period has expired;

(H) if a waiver is requested in connection with an exit incentive or other employment termination program offered to a group or class of employees, the employer (at the commencement of the period specified in subparagraph (F)) informs the individual in writing in a manner calculated to be understood by the average individual eligible to participated, as to--

(I) any class, unit, or group of individuals covered by such program, any eligibility factors for such program, and any time limits applicable to such program; and

(ii) the job titles and ages of all individuals eligible or selected for the program, and the ages of all individuals in the same job classification or organizational unit who are not eligible or selected for the program.

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(2) A waiver in settlement of a charge filed with the Equal Employment Opportunity Commission, or an action filed in court by the individual or the individual's representative, alleging age discrimination of a kind prohibited under section 623 or 633a of this title may not be considered knowing and voluntary unless at a minimum--

(A) subparagraphs (A) through (E) of paragraph (1) have been met; and

(B) the individual is given a reasonable period of time within which to consider the settlement agreement.

(3) In any dispute that may arise over whether any of the requirements, conditions, and circumstances set forth in subparagraph (A), (B), (C), (D), (E), (F), (G), or (H) of paragraph (1), or subparagraph (A) or (B) of paragraph (2), have been met, the party asserting the validity of a waiver shall have the burden of proving in a court of competent jurisdiction that a waiver was knowing and voluntary pursuant to paragraph (1) or (2).

(4) No waiver agreement may affect the Commission's rights and responsibilities to enforce this chapter. No waiver may be used to justify interfering with the protected right of an employee to file a charge or participate in an investigation or proceeding conducted by the Commission.

STATEMENT OF THE CASE

Factual Background

This is an employment discrimination suit brought pursuant to the Age Discrimination in Employment Act, 29 U.S.C. § 621 et seq. ("ADEA"). Petitioner worked for Respondent from 1964 until April 6, 1992, when he was discharged as part of a general reduction in force. Petitioner has alleged that he was discriminated against in that he was discharged while younger, less qualified, less senior employees of Respondent were retained. Upon his termination, Petitioner signed a document entitled "Settlement Agreement and General Release (the "Release") in exchange for severance benefits totaling $11,000.00. The Release was found not to fully comply with the requirements of the waiver provisions of 29 U.S.C. § 626(f) ("OWBPA") because it did not advise Petitioner to seek the advice of an attorney prior to signing it.(App.B-5a-6a)

The District Court's Decision

Petitioner filed his Original Complaint on August 25, 1993. On May 19, 1994, Petitioner filed a Motion for Partial Summary Judgment, alleging that the Release was ineffective as a matter of law because it failed to comply with the statutory requirements of the OWBPA.

On May 27, 1994, Respondent filed its Motion for Summary Judgment and Answer to Plaintiff's Motion for Summary Judgment seeking disposition of all of Petitioner's claims stating, among other things, that Petitioner had ratified the release by retaining the severance benefits for too

long a time[1].

On July 11, 1993, the district court granted Petitioner's Motion for Partial Summary Judgment in part; denied it in part; and granted Respondent's Motion for Summary Judgment. The court found that the release failed to comply with the OWBPA. Specifically, the court found that the Release did not comply with the requirements of 29 U.S.C.A. §626(f)(1)(E) because it did not advise Petitioner to consult with an attorney prior to executing the Release. However, the court granted Respondent's Motion for Summary Judgment in finding that Petitioner had ratified the Release, barring all of Petitioner's claims.

A Final Judgment against Petitioner was entered on July 11, 1994. Petitioner timely appealed the district court's Final Judgment on July 27, 1994.

The Court of Appeals' Decision

The court of appeals affirmed the district court's ruling on March 6, 1995 without a written published opinion.

REASONS WRIT SHOULD BE GRANTED

Important Legal Issue

The ADEA was enacted to eliminate age discrimination in the workplace. In enacting the ADEA, the Congress found, among other things, that:

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[1]Petitioner tendered the severance benefits back to Respondent prior to filing Petitioner's Motion for Summary Judgment.(App. B 9a).

> "(1) in the face of rising productivity and affluence, older workers find themselves disadvantaged in their efforts to retain employment, and especially to regain employment when displaced from jobs;
>
> . . . .
>
> (4) the existence in industries affecting commerce, of arbitrary discrimination in employment because of age, burdens commerce and the free flow of goods in commerce.

29 U.S.C. §621(a). The ADEA is a remedial statute enacted with the intent of prohibiting "arbitrary discrimination in employment . . ." 29 U.S.C. §621(b).

The OWBPA was enacted in part to clearly delineate the minimum requirements for waiving rights under the ADEA in a knowing and voluntary manner. 29 U.S.C. §626(f)(1).

Whether ADEA waivers are enforceable is perhaps the most important issue which faces both the employer and the employee in the face of downsizing and layoffs. The employer needs to know whether the waiver which it has presented to the employee is enforceable or not, and the employee, if he is to waive rights under the ADEA must not be made to do so unknowingly or involuntarily. The OWBPA clearly intends to delineate a clear-cut threshold for determining when a waiver of ADEA rights is knowing and voluntary.

However, in *Wamsley v. Champlin Refining and Chemicals, Inc.*, 11 F.3d 534 (5th. Cir. 1993), cert denied, 115 S.Ct. 1403. 131 L.Ed.2d. 290 (1995) the Fifth Circuit Court of Appeals held that a waiver of ADEA rights which does not comply with the minimum requirements under the OWBPA is voidable and not void. Therefore, the court

reasoned, one who has received consideration for such a waiver must tender the consideration back to the employer in order to avoid ratifying the otherwise unenforceable waiver. The Fifth Circuit followed the decision in *Wamsley* with *Wittorf v. Shell Oil Company*, 37 F.3d 1151 (5th Cir. 1994).

As a practical matter, the decision in *Wamsley* renders the requirements of the OWBPA for executing a voluntary release meaningless because an employer can completely fail to comply with the OWBPA, pay severance benefits and then claim that acceptance and retention of the severance benefits constituted ratification of the otherwise involuntary release. An employer's superior bargaining position, which the OWBPA no doubt sought to equalize, has in fact been restored by the decisions of the Fifth Circuit which in essence render impotent the clear intent of the Congress in enacting the OWBPA.

As long as involuntary waivers can be ratified, uncertainty exists and cases will have to be decided on an ad hoc basis. The obvious question that arises is how soon after executing an involuntary release must one return severance benefits in order to avoid ratification? This will require a finding of fact by each court adjudicating ADEA cases involving an involuntary waiver or release of ADEA rights. This problem is particularly evident in the case at bar where Blakeney *did* return the severance benefits to Respondent only to have the Respondent refuse such tender and argue that the tender was not *timely*.

This is an important legal issue which potentially threatens many Americans' civil rights if not finally determined by this Court.

Circuit Split

There is currently a split in the circuits as to whether a release/waiver which fails to comply with the requirements of the OWBPA is void or voidable and, consequently, whether one must tender consideration for such waivers in order to maintain an ADEA lawsuit. As shown above, the Fifth Circuit in *Wamsley*, and later in *Wittorf* has held that waivers that do not comply with the OWBPA are voidable (and therefore can be ratified). The Fifth Circuit based its decision in *Wamsley* on *Grillet v. Sears, Roebuck & Co.*, 927 F.2d 217 (5th Cir. 1991) and *O'Shea vs. Commercial Credit Corp.*, 930 F.2d 358 (4th Cir. 1991), cert.denied, 502 U.S. 859, 112 S.Ct. 177, 166 L.Ed.2d. 139 (1991) which were both pre-OWBPA. However, both cases were decided on the premise that state common law ratification doctrine operated to require a tender of the consideration in order to avoid ratification or an ADEA waiver.

On the contrary, the Seventh Circuit Court of Appeals has held that such defective releases are void (and therefore cannot be ratified). *Oberg v. Allied Van Lines, Inc.*, 11 F.3d 679 (7th Cir. 1993), cert. denied, 114 S.Ct. 2104, 128 L.Ed.2d 665 (1994). In *Oberg* the Seventh Circuit followed the Eleventh Circuit in a pre-OWBPA case, *Forbus v. Sears Roebuck & Co.*, 958 F.2d 1036 (11th Cir. 1992),cert. denied, 113 S.Ct. 412, 121 L.Ed.2d 336 (1992),[2] in its result, but its reasoning was based entirely upon the language of OWBPA.

In *Oberg*, the age discrimination plaintiffs had received severance benefits upon their termination from defendant/employer in exchange for executing releases. The

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[2]The court in ***Forbus***, relied on ***Hogue v. Southern R. Co.***, 390 U.S. 516, 88 S.Ct. 1150, 20 L.Ed. 2d 73 (1968) in its decision.

defendant stipulated that the releases did not comply with 29 U.S.C. §626(f)(1)(F)&(H), but argued that the plaintiffs had ratified the releases by failing to return the consideration to the defendant. The releases obligated the employees to return the severance benefits if they breached the agreement.[3] The plaintiffs stipulated that they had not tendered the severance benefits to the defendant. The court in *Oberg* stated:

> "Had Congress not spoken this court may have been inclined to follow *Grillet*[4] and *O'Shea*[5], and allow employees the freedom to ratify their severance agreements through general principles of contract law. However, Congress has occupied this area of the law through the enactment of the OWBPA.
>
> The OWBPA limits the form in which an employee and employer may contract to waive the ADEA provisions. The OWBPA states that '[a]n individual may not waive any right or claim under this chapter unless the waiver is knowing and voluntary.' . . . . The OWBPA language plainly restricts an employee's freedom to waive his rights or claims under the ADEA. When the plain text of a statute is clear then 'courts must presume that a

---

[3]The provision read: "Breach of this Agreement shall constitute a forfeiture of additional benefits referenced. If those benefits have already been conveyed as of the time of breach, the employee agrees that he/she will return these benefits." *Oberg*, 11 F.3d at 680.

[4]*Grillet v. Sears, Roebuck & Co.*, 927 F.2d 217 (5th Cir. 1991).

[5]*O'Shea vs. Commercial Credit Corp.*, 930 F.2d 358 (4th Cir. 1991), cert.denied, 502 U.S. 859, 112 S.Ct. 177, 166 L.Ed.2d 139 (1991)

legislature says in a statute what it means and means in a statute what it says.'"

Oberg, 11 F.3d at 683. Consequently, the issue is not one of policy, but simply a matter of legislative intent. Congress has prohibited an employee from waiving ADEA claims absent compliance with the statutory requirements. Consequently, such a waiver contract cannot be ratified by retaining the consideration and there is no duty to tender the severance benefits in order to maintain an action for age discrimination. *Id.* The Fifth Circuit's decision in *Wamsley* and *Wittorf* is in conflict with the clear language of the statute.

This is an issue that merits immediate attention. Already four circuits--the Fourth, Fifth, Seventh and Eleventh--have addressed this issue from either a pre-OWBPA or post-OWBPA standpoint. Waiting for other circuits to consider this issue will not clarify the issue at hand. The issue is clear and the adverse impact of the precedent of the Fourth and Fifth Circuits on the civil rights of Americans over 40 years of age is certain.

Conflict with Decision of this Court

The decisions of the Fourth and Fifth Circuit are in conflict with the decision of this Court in *Hogue v. Southern R. Co.*, 390 U.S. 516, 88 S.Ct. 1150, 20 L.Ed. 2d 73 (1968). Although *Hogue* was a FELA case, the reasoning of that case is analogous to OWBPA cases. *Hogue* held that, based on 45 U.S.C. § 51 et seq. (1939), (which voids any contract which attempts to exempt a common carrier from liability under FELA), FELA employees were not required to return the consideration in order to challenge the validity of a FELA release. The Court held that such releases are void and "the question of whether a tender back of the

consideration was a prerequisite to the bringing of the suit is to be determined by federal rather than state law." *Hogue*, 390 U.S. at 517, 88 S.Ct. at 1151.

Oberg and *Forbus* recognized the applicability of *Hogue* to ADEA waivers and tender requirements. Consequently, this is a matter which should be decided by this Court in order to resolve the conflict with *Hogue*.

CONCLUSION

Petitioner requests that this Court grant his petition for certiorari because of the importance of this issue which potentially affects many Americans over the age of 40 and their employers. Furthermore, there is currently a split between five Courts of Appeal which should be resolved now. Waiting for other courts to rule will not further clarify the issue. Lastly, the rulings of the Fifth Circuit in *Wamsley* and the Fourth Circuit in *Oshea* are in conflict with this Court's decision in *Hogue*. For these reasons, Petitioner requests that his petition for certiorari be granted.

Respectfully submitted,

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APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 94-20560

MICHAEL F. BLAKENEY,
Plaintiff-Counter
Defendant-Appellant,

versus

BAKER HUGHES, INC.,
Defendant-Counter
Plaintiff-Appellee.

Appeal from the United States District Court
for the Southern District of Texas
(CA-H-93-2668)

Before POLITZ, Chief Judge, REAVLEY and BARKSDALE, Circuit Judges.

PER CURIAM:*

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*Local Rule 47.5 provides: "The publication of opinions that have no precedential value and merely decide particular cases on the basis of well-settled principles of law imposes needless expense on the public and burdens on the legal profession." Pursuant to that Rule, the Court has determined that this opinion should not be published.

This matter is before the court on appeal by Michael F. Blakeney of an adverse summary judgment in his ADEA complaint against Baker Hughes, Inc. Having considered the briefs, oral arguments of counsel, and the summary judgment record, and on the basis of the findings and conclusions of the district court in it thorough and comprehensive Memorandum and Order filed July 11, 1994, the judgment appealed is AFFIRMED.

APPENDIX B

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

MICHAEL F. BLAKENEY,	§	
Plaintiff,	§	
	§	CIVIL ACTION NO.
v.	§	H-93-2668
	§	
BAKER HUGHES	§	
INCORPORATED,	§	
Defendant.	§	

FINAL JUDGMENT

In accordance with the court's Memorandum and Order, this action is **DISMISSED** with prejudice, and defendant's counterclaim is **DISMISSED** without prejudice. (See Docket Entry No. 14 at 14.)

This is a **FINAL JUDGMENT**.

SIGNED at Houston, Texas, on this 11th day of July, 1994.

/s/ Sim Lake
SIM LAKE
UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

MICHAEL F. BLAKENEY, Plaintiff,	§	
v.	§	CIVIL ACTION NO. H-93-2668
BAKER HUGHES INCORPORATED, Defendant.	§	

MEMORANDUM AND ORDER

Pending before the court are Plaintiff's Motion for Partial Summary Judgment (Docket Entry No. 12) and Defendant's Motion for Summary Judgment (Docket Entry No. 14).

Plaintiff, Michael F. Blakeney, alleges that Baker Hughes Inc., his former employer, terminated his employment because of his age in violation of the Age Discrimination in Employment Act, 29 U.S.C. § 621, et seq. (ADEA). Plaintiff also alleges state law claims under Tex. Rev. Civ. Stat. Ann. art. 5221k and for intentional infliction of emotional distress. Among its defenses, defendant alleges that on April 7, 1992, plaintiff signed a "Settlement Agreement and General Release" that operates as a release and bar to the plaintiff's claims. Defendant also filed a counterclaim against plaintiff for breach of the Settlement Agreement and General Release. Plaintiff's motion for partial summary judgment argues that the release is

ineffective as a matter of law because it fails to comply with the requirements of 29 U.S.C. § 626(f)(1).[1]

1. **§ 626(f) (1) (E)**

Plaintiff argues that the release is invalid because he was not advised to consult with an attorney. The second substantive paragraph of the release signed by plaintiff states:

> The Employee represents and agrees that he fully understands his right to discuss all aspects of this Agreement with his private attorney, to the extent, if any, that he desires he has availed himself of this right, that he has carefully read and fully understands all of the provisions of this Agreement and that he is voluntarily entering into this Agreement. (Settlement Agreement and General Release, Docket Entry No. 1, Exhibit A at 4)

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[1] 29 U.S.C. § 626(f) imposes the minimum standard for a waiver of a claim under the ADEA:

(1) An individual may not waive any right or claim under this chapter unless the waiver is knowing and voluntary. . . .[A] waiver may not be considered knowing and voluntary unless at a minimum--

> (A) the waiver is part of an agreement between the individual and the employer that is written in a manner calculated to be understood by such individual, or by the average individual eligible to participate;
>
> . . .
>
> (C) the individual does not waive rights or claims that may arise after the date the waiver is executed;
>
> . . .
>
> (E) the individual is advised in writing to consult with an attorney prior to executing the agreement; . . .

Defendant argues that acknowledging the right to consult an attorney is equivalent to being advised to consult an attorney. 29 U.S.C. § 626(f)(1)(E) states, however, that at a minimum the individual must be "advised in writing to consult with an attorney prior to executing the agreement. . ." Although the court has not found any cases that construe this section of the statute, the ADEA "is remedial and humanitarian legislation and should be liberally interpreted to effectuate the congressional purpose of ending age discrimination in employment." *Dartt v. Shell Oil Co.*, 539 F.2d 1256, 1261 (10th Cir. 1976), *aff'd men.*, 98 S.Ct. 600 (1977). Because the release does not advise plaintiff to consult with an attorney, the court concludes that it fails to satisfy § 626(f)(1)(E), and plaintiff's Motion for Partial Summary Judgment (Docket Entry No. 12) is **GRANTED** on this issue.

2. § 626(f) (1) (C)

Plaintiff argues that the release runs afoul of § 626(f) (1) (C), which prohibits a release "that waives rights or claims that may arise after the date of the waiver." Plaintiff bases this argument on the third substantive paragraph of the release, which states that defendant is discharged from:

> all . . . claims . . . arising out of alleged violations of . . . the Federal Age Discrimination in Employment Act, which the Employee now has, owns or holds, or claims to have, owned or hold, or which Employee at any time heretofore had, owned or held, or claimed to have, own or hold, or which Employee at any time hereinafter may have, own or hold, or claim to have, own or hold against each or any of the Releases. (Release at 1)

Plaintiff's argument ignores the more specific language in the eighth substantive paragraph:

> Notwithstanding any of the above, Employee is not waiving any rights or claims that may arise after the date of the execution of this Agreement by Employee. (Release at 2)

Because the specific language of the eighth paragraph supersedes the general language of the third paragraph the release satisfies § 626(f) (1) (C), and plaintiff's Motion for Partial Summary Judgment (Docket Entry No. 12) is **GRANTED** on this issue.

3. § 626(f) (1) (A)

Plaintiff argues that the release violates 29 U.S.C. § 626(f) (1) (A) because there is ambiguity between the language of the third and eighth paragraphs as to whether the release applies to future claims. To support this argument plaintiff refers to his deposition testimony that he did not understand what he was signing. Section 62(f) (1) (A) requires that the waiver be "written in a manner calculated to be understood by such individual, or by the average individual eligible to participate." Although the court has concluded that the release satisfies § 626(F) (1) (C), the ambiguity between the third and eighth substantive paragraphs nevertheless provides support for plaintiff's argument. The ambiguity, when coupled with plaintiff's testimony, creates a fact issue that precludes summary judgment for either party on this issue.

4. Ratification

Plaintiff argues that a release that does not comply with the requirements of § 626(f) (1) is void as a matter of law and cannot be ratified. Alternatively, plaintiff argues that if the release was only voidable it was not ratified because plaintiff made a timely offer to tender the severance benefits that formed the consideration for the release back to defendant. Defendant argues that the tender was untimely and that plaintiff ratified the release by keeping the benefits for more than two years.[2]

In *Grillet v. Sears, Roebuck & Co.*, 927 F.2d 217, 221 (5th Cir. 1991), the court held that a voidable release would be ratified by the retention of benefits that formed the consideration for the release. The court explained that "[t]o avoid ratifying the release" a plaintiff must return the consideration "soon after" he learns that the release is voidable. *Id.* In *Wamsley v. Champlin Refining & Chemicals, Inc.*, 11 F.3d 534 (5th Cir. 1993), the court held that its holding and reasoning in *Grillet* applied notwithstanding the enactment of 29 U.S.C. § 626(f). The court held that a release that does not meet the requirements of 29 U.S.C. § 626(f) (1) (A)-(H) is not void of legal effect, but is simply "not knowing and voluntary and thus [is] subject to being avoided at the election of the employee." *Id.* at 539. The court also held that if the employee retains the "consideration for [his] promise not to sue," he manifests his "intention to be bound by the waivers" and thus ratifies

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[2] Although defendant did not plead ratification in its answer, the answer did recite the execution of the release and allege the defenses of release, wavier, and estoppel. Pursuant to Fed. R. Civ. P. 15(a), which provides that leave to amend shall be freely given when justice so requires, the court **GRANTS** Defendant's Motion for Leave to Amend Answer (Docket Entry No. 16).

the voidable release. *Id.* at 540. *Accord, Williams v. Phillips Petroleum Co.*, 1994 WL 247317 at 10 (5th Cir. June 24, 1994).

The Settlement Agreement and General Release signed by plaintiff recited that it was a settlement of all possible disputes with defendant that arose out of plaintiff's employment with defendant and the termination of his employment by defendant. It expressly released defendant from ADEA claims and state statutory claims. Defendant paid plaintiff over $11,000 in severance benefits as consideration for plaintiff's signing the release on April 7. 1992. (Plaintiff's deposition at 104) Plaintiff expressed no desire to return the consideration when this suit was filed in August of 1993 or when plaintiff was deposed in February of 1994. (*Id.* at 109.) Only in May of 1994 did plaintiff attempt to tender back the benefits to defendant.

Plaintiff argues that defendant is not entitled to summary judgment on its ratification defense because until his lawyer learned of the Fifth Circuit's opinion in *Wamsley* he did not know that the release was voidable. The court is not persuaded by this argument for several reasons. First, plaintiff, or at least his lawyer, was on notice since *Grillet* was decided in March of 1991 that the release was merely voidable and that continued retention of the benefits would ratify it. The *Grillet* court held that a release that was possibly deficient under the ADEA was ratified when the plaintiff retained the benefits. 927 F.2d at 220-221. Although the court did not expressly state that a release was not void as a matter of law, the court implicitly assumed this distinction in its consideration of the ratification issue.

Moreover, in *Grillet* the court held that timeliness of a tender back offer was measured from the date the plaintiff discovers that he was discriminated against. 927 F.2d at

221. Blakeney's allegation of age discrimination is based on the fact that he was laid off while younger people were retained. (Plaintiff's deposition at 17) Blakeney was aware of these facts at the time of his layoff in April of 1992, yet chose not to make a tender back of the benefits until May of 1994.[3] In *Grillet* the court held as a matter of law that retaining benefits for more than two years made it "simply too late . . . to avoid ratification." 927 F.2d at 221. Since Blakeney likewise retained the benefits for more than two years after he knew of defendant's alleged discrimination, he ratified the release.[4] Defendant's Motion for Summary Judgment (Docket Entry No. 14) is **GRANTED** on this issue; and the release bars all of plaintiff's claims.

5. Intentional Infliction of Emotional Distress

To prove intentional infliction of emotional distress under Texas law a plaintiff must show that (1) the defendant acted intentionally or recklessly, (2) the conduct was extreme and outrageous, (3) the action of the defendant proximately caused plaintiff emotional distress, and (4) the emotional distress suffered by plaintiff was severe. *Dean v. Ford Motor Credit Co.*, 885 F.2d 300, 306 (5th Cir. 1989). Extreme or outrageous conduct within the meaning of this tort is conduct that is so outrageous in character and so extreme in degree as to go beyond all possible bounds of decency and to be regarded as atrocious and utterly

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[3] Plaintiff filed a charge with the EEOC alleging age discrimination on November 2, 1992. (Exhibit to plaintiff's complaint)

[4] Plaintiff argues that because the tender back made in May of 1994 was rejected, any earlier tenders would have also been rejected, and thus any earlier tender would have been futile. The court is not persuaded by the argument. Even if an earlier tender back had been rejected, plaintiff's attempt to make an earlier tender would be relevant in considering whether there was unreasonable delay in making a tender.

intolerable in civilized society. An employer who does no more than exercise its right to terminate an employee has not committed outrageous conduct to the degree or character required for liability for intentional infliction of emotional distress.

The facts in this case do not show that defendant engaged in any threatening or offensive conduct. Plaintiff's deposition reflects that the only outrageous conduct alleged is that defendant laid off plaintiff. (Plaintiff's deposition at 23, 25) Additionally, plaintiff alleges only worry and weight gain as the result of his layoff. *Id.* at 25-28. Accordingly, the court concludes plaintiff has failed to raise a genuine issue of material fact as to any of the four necessary elements of his claim for intentional infliction of emotional distress. Defendant's Motion for Summary Judgment (Docket Entry No. 14) is **GRANTED** as to this claim.

Conclusion and Order

For the reasons explained above, plaintiff's Motion for Partial Summary Judgment (Docket Entry No. 12) is **GRANTED** in part and **DENIED** in part, and Defendant's Motion for Summary Judgment (Docket Entry No. 14) is **GRANTED** in part and **DENIED** in part.

SIGNED at Houston, Texas, on this 11th day of July, 1994.

/s/ Sim Lake
SIM LAKE
UNITED STATES DISTRICT JUDGE

(2)

Supreme Court, U.S.
FILED
JUN 29 1995
OFFICE OF THE CLERK

No. 94-2042

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1994

MICHAEL F. BLAKENEY,
Petitioner,

v.

BAKER HUGHES INCORPORATED,
Respondent,

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

---

RESPONDENT'S BRIEF IN OPPOSITION

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34 pp

QUESTION PRESENTED

Whether a waiver or release of claims under the Age Discrimination in Employment Act, which allegedly does not meet the minimum statutory requirements of the Older Workers Benefit Protection Act, is ratified by retention of the consideration.

PARTIES TO THE PROCEEDING

Petitioner, appellant below, is Michael F. Blakeney ("Blakeney").

Respondent, appellee below, is Baker Hughes Incorporated ("Baker Hughes"). In accordance with Rule 29.1 of the Rules of this Court, Respondent states that it has no parent company. Respondent has many wholly owned subsidiaries. Respondent's subsidiaries which are not wholly owned, either directly or through other subsidiaries, are:

CKS Espanola S.A.
Drilling Fluids Services (Far East) Stn Bhd.
Malaysia Mud and Chemicals Sdn. Bhd.
Milpark Nigeria Ltd.
Baker Hughes INTEQ (M) Sdn. Bhd.
Lombard Baker Leasing Co.
Hughes Tool Company Chile Ltda.
Baker Hughes Mining Tools Peru, S.A.
Baker Oil Tools (Brunei) Sdn. Bhd.
Baker Oil Tools de France S.A.R.L.
Aquaness Quimica de Venezuela S.A.
Baker Quimica de Venezuela S.A.
Venezolana de Resinas, C.A.
P.T. Elnusa Chemlink
Gummiwerk Christensen–Netzsch GmbH
Reed Rock do Brazil Industrial Ltda.
Christensen–Netzsch Rubber, Inc.
ChuanShi Christesen Diamond Bit Company, Ltd.
EXLOG Arabian Gulf Limited
Mid–East Drill Bit Manufacturing Co. Ltd.

Abunayyan–Hughes Tool S.A. Ltd. Co.
Lufkin Argentina S.A.
Milpark Kuwait for Drilling Fluids Company
Milchem Libya Co., Ltd.
P.T. Milchem Indonesia
Teleco Oilfield Services Sdn. Bhd.
Eimco (Central Africa) (Pvt) Limited
Milafon Venezolana C.A.
Ferranti Eastman Survey GmbH
Societe Camerounaise de Broyage Minerai Petroliers
Baker Nigeria Ltd.
Proveedores Para Operaciones Energeticas S.A. de C.V.
Herramientas Interamericanas S.A. de C.V.
Baker Oil Treating (India) Private Ltd.
P.T. Eastman Christensen Indonesia
Baker Hughes Gabon S.A.
Baker Mira Saudi Arabia Limited

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NO. 94-2042

IN THE
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MICHAEL F. BLAKENEY,
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Respondent,

On Petition For Writ of Certiorari To The United States Court Of Appeals For The Fifth Circuit

---

RESPONDENT'S BRIEF IN OPPOSITION

COMES NOW Baker Hughes Incorporated, Respondent ("Baker Hughes") and respectfully represents:

STATEMENT OF THE CASE

The Older Workers Benefit Protection Act ("OWBPA") codifies, in the context of claims under the Age Discrimination in Employment Act ("ADEA"), 29 U.S.C. § 621 et seq., the common law principle that any waiver or release of claims or causes of action must be "knowing and voluntary." 29 U.S.C. § 626(f)(1). This case presents the question of whether the OWBPA also forecloses, with respect to claims under the ADEA, the common law principle that a voidable waiver or

release is ratified by retention of the consideration.

The Fifth Circuit in this case, and in two prior cases, correctly held that a release which does not satisfy the "knowing and voluntary" requirements of the OWBPA is voidable but not void and is ratified by retention of the severance benefits.

Petitioner, Michael F. Blakeney ("Blakeney") is a former employee of Baker Hughes. Blakeney was laid off by Baker Hughes on April 6, 1992 as part of a general reduction in force. In connection with the termination of his employment, he signed a written Settlement Agreement and General Release (the "Release") by which he released all claims and causes of action without limitation, including expressly rights arising out of the Federal Age Discrimination in Employment Act. A copy of the Settlement Agreement and General Release is Appendix A to this Brief. As consideration for the Release, he was paid severance benefits totalling in excess of $11,000.00. By the express terms of the Release, Michael F. Blakeney released the claims which are the basis of his complaint.

Blakeney signed the Release on April 7, 1992 and received the severance benefits within a week or two afterwards. Blakeney filed a complaint with the E.E.O.C. on November 2, 1992 alleging age discrimination. The E.E.O.C. ruled against Blakeney. Blakeney filed his Complaint with the District Court on August 25, 1993 alleging claims under the ADEA. Blakeney also asserted causes of action under Tex.Rev.Civ.Stat.Ann.Art. 5221K and for the tort of intentional infliction of emotional distress.

Blakeney was deposed on February 23, 1994. As of that date, Blakeney had not tendered any of the severance benefits

back to Baker Hughes and had no intention to do so. On May 19, 1994, Blakeney tendered the severance benefits to Baker Hughes. Baker Hughes refused the tender and returned the check to Mr. Blakeney's attorney on May 25, 1994.

Blakeney moved for partial summary judgment contending that the Release was ineffective as a matter of law for failure to comply with three provisions of 29 U.S.C. § 626(f)(1), specifically clauses (A), (C) and (E). Blakeney's challenge to the Release was solely a question of law concerning the language of the Release. Blakeney presented no evidence concerning any events or circumstances concerning the execution of the Release or any actions of Baker Hughes which induced the signing of the Release. No attempt was made to show that the Release was procured by fraud, duress or undue influence. Blakeney's depositions showed that, in fact, there was no fraud, duress or undue influence. Blakeney relied solely upon his contention that the language of the Release does not comply with the requirements of 29 U.S.C. § 626(f)(1).

Baker Hughes then moved for summary judgment on the ground that the Release was knowing and voluntary and complied with 29 U.S.C. § 626(f)(1). Baker Hughes further contended that if, for any reason, the Release did not comply with 29 U.S.C. § 626(f)(1), then the Release was voidable, only, not void, and that by receiving and retaining the severance benefits, Blakeney ratified the Release. Blakeney's attempts to revoke the Release and tender back the severance benefits, more than two years after the Release was signed and the severance benefits were paid, was not timely. The attempt to rescind the Release was ineffective because ratification of a voidable contract having once been made cannot thereafter be revoked and the Release, having been ratified, cannot be recalled.

The District Court concluded that Blakeney ratified the Release by retaining the severance benefits, and that his attempt to revoke the Release by tendering back the severance benefits more than two years after the date of the Release was too late. Summary Judgment was granted to Baker Hughes. In an unpublished memorandum, the District Court based its ruling on *Wamsley v. Champlin Refining and Chemicals, Inc.*, 11 F.3d 534 (5th Cir. 1993), cert. denied, 115 S.Ct. 1403, 131 L.Ed.2d. 290 (1995) which held that a release of ADEA claims which did not comply with the requirements of the OWBPA was voidable but not void and was ratified by retention of the severance benefits, and upon *Grillet v. Sears, Roebuck & Co.*, 927 F.2d 217 (5th Cir. 1991) which held that an attempt to tender back severance benefits more than two years after the release was signed and the benefits were paid simply came too late to avoid ratification.

Blakeney appealed from the summary judgment on his claims under the ADEA and Tex.Rev.Civ.Stat.Ann.Art. 5221K. The Court of Appeals affirmed the District Court's ruling on March 6, 1995 without a written published opinion. *Blakeney v. Baker Hughes Incorporated*, 50 F.3d 1032 (5th Cir. 1995).

REASONS FOR DENYING THE WRIT

1. THE OWBPA DOES NOT FORECLOSE APPLICATION OF THE PRINCIPLE OF RATIFICATION TO A RELEASE OF CLAIMS UNDER THE ADEA

Blakeney errs in contending that the OWBPA forecloses application of the common law doctrine of ratification to a release of claims under the ADEA. The OWBPA merely codified under the ADEA the common law principle that a waiver or release must be "knowing and voluntary."

It is a general principle of contract law that a release can be rescinded only upon a tender of any consideration received. Samuel Williston, 12 *Williston on Contracts* § 1460 (Walter H.E. Jaeger Ed., 3d Ed. 1970). The doctrine of contractual ratification is the enforcement of a promise to perform all or part of an antecedent contract of the promisor, previously voidable by him, but not avoided prior to the making of the promise. RESTATEMENT (SECOND) OF CONTRACTS § 85 (1981). To have ratification, there must be an antecedent contract that was previously voidable, but not avoided. A contract is voidable if there exist grounds upon which a party can avoid, or disaffirm, his duty of performance. Such grounds have traditionally included fraud, duress, mistake and infancy. RESTATEMENT (SECOND) OF CONTRACTS § 7 (1981). Ratification operates to allow a party having the power to avoid his contractual duty to make, or be deemed to have made, a new promise to perform his previously voidable duty and thus, extinguish his power of avoidance. RESTATEMENT (SECOND) OF CONTRACTS § 85 cmt. a. (1981). Blakeney does not dispute that his suit is barred by the Release if the traditional common law doctrine of ratification is applicable.

Blakeney contends that the Fifth Circuit Court of Appeals holding in this case and in the cases of *Wamsley v. Champlin Refining and Chemicals, Inc.*, 11 F.3d 534 (5th Cir. 1993), rehearing en Banc denied, 37 F.3d 634, cert. denied, 115 S.Ct. 1403, 131 L.Ed.2d 290 (1995), and *Wittorf v. Shell Oil Company*, 37 F.3d 1151 (5th Cir. 1994) is wrong and should be reversed. These cases all stand for the proposition that a release of ADEA claims which does not meet the "knowing and voluntary" requirements of the OWBPA is voidable, but not void, and is ratified by retention of the consideration. Blakeney relies upon the Seventh Circuit in the case of *Oberg v. Allied Van Lines, Inc.*, 11 F.3d 679 (7th Cir. 1993), cert denied, 114 S.Ct. 2104, 128 L.Ed.2nd 665 (1994), and the

Eleventh Circuit in the case of *Forbus v. Sears Roebuck & Co.*, 958 F.2d 1036 (11th Cir. 1992), cert. denied, 113 S.Ct. 412, 121 L.Ed.2d 336 (1992) and takes the position that a release which fails to comply with the requirements of the Older Workers Benefit Protection Act, 29 U.S.C. § 626(f)(1) ("OWBPA") is void, not merely voidable, and cannot be ratified. *Wamsley v. Champlin Refining and Chemicals, Inc.*, 11 F.3d 534, 541 (5th Cir. 1993) cert. denied, 115 S.Ct. 1403, 131 L.Ed.2d. 290 (1995), expressly rejected the reasoning of *Forbus* and *Oberg*.

Nothing in the Text or Legislative History of the OWBPA Discloses a Congressional Intent to Disturb the Common Law Principle of Ratification.

Before the adoption of the OWBPA, there was a requirement under federal common law that a release of ADEA claims be "knowing and voluntary." The "knowing and voluntary" requirement which existed before the enactment of the OWBPA included the same elements: (1) the employee's education and business experience, (2) the amount of time the employee had possession of or access to the agreement before signing it, (3) the role of the employee in deciding the terms of the agreement, (4) the clarity of the agreement, (5) whether the plaintiff was represented by or consulted with an attorney, and (6) whether the consideration paid given in exchange for the waiver exceeds employee benefits to which the employee was already entitled by contract or law. *O'Hare v. Global Natural Resources, Inc.*, 898 F.2d 1015 (5th Cir. 1990); *Bormann v. AT & T Communications, Inc.*, 875 F.2d 399 (2nd Cir. 1989), cert denied, 493 U.S. 924, 110 S.Ct. 292, 107 L.Ed.2d 272 (1989). Under this common law standard, a release which was not "knowing and voluntary" was voidable, but not void, and was ratified by retention of the severance benefits. *O'Shea v. Commercial Credit*, 930 F.2d 358 (4th Cir. 1991), cert. denied,

502 U.S. 859, 112 S.Ct. 177, 116 L.Ed.2d 139; *Grillet v. Sears, Roebuck & Co.*, 927 F.2d 217 (5th Cir. 1991). The enactment of the OWBPA simply codified a statutory definition of "knowing and voluntary."

The traditional common law basis for voidable contracts, fraud, duress, coercion or mistake of fact, are similar to those circumstances against which Congress sought to protect older workers. A contrary interpretation would be inconsistent with one of the goals of the ADEA, "To help employers and workers find ways of meeting problems arising from the impact of age on employment." *Wamsley v. Champlin Refining and Chemicals, Inc.*, 11 F.3d 534, 539 (5th Cir. 1993), cert. denied, 115 S.Ct. 1403, 131 L.Ed.2d. 290 (1995), quoting 29 U.S.C. § 621(b). Ratification permits private resolution of ADEA disputes without the cost associated with litigation.

Nothing in the text of the OWBPA evidences a congressional intent to disturb the common law principle of ratification. The language of the OWBPA is plain. The statute says that a waiver which fails to satisfy the requirements of 29 U.S.C. § 626(f)(1) subsections (A) through (H) is not "knowing and voluntary." The statute does not say that a waiver which fails to satisfy the requirements of 29 U.S.C. § 626(f)(1) subsections (A) through (H) is void of legal effect. The plain meaning of 29 U.S.C. § 626(f)(1) is that such waivers are not "knowing and voluntary" and thus subject to being avoided at the election of the employee. *Wamsley*, 11 F.3d at 539.

Prior to the enactment of 29 U.S.C. § 626(f)(1), the law was clear that even if a release executed by an employee was invalid to release age discrimination claims, the employee subsequently ratified the agreement by accepting all severance pay and other continuing benefits of the termination package. *O'Shea v. Commercial Credit*, 930 F.2d 358 (4th Cir. 1991),

cert. denied, 502 U.S. 859, 112 S.Ct. 177, 116 L.Ed.2d 139; *Grillet v. Sears, Roebuck & Co.*, 927 F.2d 217 (5th Cir. 1991). If Congress had intended to reverse the holding of these cases in the OWBPA, it would have done so expressly.

Nothing in the legislative history of the OWBPA evidences a congressional intent to disturb the common law principle of ratification. The legislative history of the OWBPA indicates that the fundamental purpose of the waiver provisions is to ensure that an older worker who is asked to sign an ADEA waiver does so in the absence of fraud, duress, coercion, or mistake of material facts. S.Rep.No. 101–263, 101st Cong., 2nd Sess. (1990), reprinted in 1990 U.S.C.C.A.N. 1509, 1537. The circumstances against which these provisions were designed to protect are the same circumstances that have traditionally given rise to grounds upon which a party can avoid contractual obligations. *Wamsley*, 11 F.3d at 539.

The provisions of § 626(f)(1) support this conclusion. Subsection (G) of § 636(f)(1) provides that for seven days after execution of a waiver, an employee may revoke the agreement and that the agreement does not become enforceable until the expiration of the seven day period. If non–compliance with the other subparts of § 626(f)(1) rendered the agreement void, there would be no need for subpart (G). *Wamsley*, 11 F.3d at 539.

An interpretation of § 626(f)(1) that renders defective waiver agreements void would be inconsistent with one of the expressed purposes of the ADEA: "to help employers and workers find ways of meeting problems arising from the impact of age on employment." 29 U.S.C. § 621(b). The simplest and easiest way to further this purpose is to give effect to private agreements which resolve age related employment disputes without litigation. If employers were forced to assume

the risk that non-compliance with the technical requirements of § 626(f)(1) renders a waiver agreement void and not capable of being ratified, employers would be disinclined to propose such waivers or pay severance benefits conditioned upon such waivers. *Wamsley*, 11 F.3d at 539.

The holding of *Wamsley* and *Wittorf* also conforms with ordinary rules of statutory construction. Under American law, there are exceptions to the general rule that an agreement which violates a provision of a statute, or which cannot be performed without violating a statute, is illegal and void. A distinction may be made "between statutes 'which forbid certain contracts to be made or certain acts to be done' and 'those which prescribe a certain mode and manner of doing the act, or the procedure to be followed in making the contract,' the inference being that a violation of a statute of the latter kind does not necessarily render a contract void." 55 A.L.R.2d 481, at 491, quoting *Commercial Credit Co. v. Schreyer*, 120 Ohio St. 568, 166 N.E. 808, 63 A.L.R. 674 (1929) at 166 N.E. p. 678; *United States v. Continental Fwdg. Company*, 311 F.Supp. 956 (U.S. Customs Court 1970), affirmed 463 F.2d 1129. 29 U.S.C. § 626(f)(1) clearly falls within the latter category. 29 U.S.C. § 626(f)(1) does not make a release of claims under the ADEA illegal. It simply prescribes the manner in which a claim under the ADEA may be released and the procedure to be followed in making the contract.

Concluding that a release which does not comply with the OWBPA is voidable but not void does not render the requirements of the OWBPA for executing a knowing and voluntary release meaningless. The Fifth Circuit stated in a footnote to the opinion in *Wamsley*:

> Note that the court is not enforcing the promises contained in any of the allegedly

> voidable waiver agreements as such. What the court is enforcing is a new promise, evidenced by subsequent conduct, to be bound by the terms of the original waiver agreements. Therefore, that the original waiver agreements may not have been in compliance with § 626 is of no consequence. The court is now concerned with the enforcement of a new promise which gives rise to a new legal obligation. As a new promise that creates a new obligation, it is not subject to the waiver requirements of § 626, and thus, such requirements pose no bar to its enforcement.

Wamsley v. Champlin Refining and Chemicals, Inc., 11 F.3d 534, 541 n. 11 (5th Cir. 1993), cert. denied, 115 S.Ct. 1403, 131 L.Ed.2d. 290 (1995).

The plain meaning of OWBPA is that a release which does not conform to the statutory requirements is not "knowing and voluntary" and may be avoided by the employee, at his option.

Applying the Common Law Principle of Ratification to a Release of Claims Under the ADEA Does Not Conflict With this Court's Opinion in Hogue v. Southern R. Co.

Hogue v. Southern R. Co., 390 U.S. 516, 88 S.Ct. 1150, 20 L.Ed.2d 73 (1968) (per curiam) does not apply to the ADEA. *Hogue* interpreted the FELA, which protects injured railroad workers. The policies of the FELA and the ADEA are different. The pertinent provision of the FELA is 45 U.S.C. § 55, which states:

> Any contract, rule, regulation or device, whatsoever, the purpose or intent of which shall

> be to enable any common carrier to exempt itself from any liability created by the Act, shall to that extent be void....

The breadth of this statute was recognized in *Duncan v. Thompson*, 315 U.S. 1, 62 S.Ct. 422, 86 L.Ed. 575 (1942). In that case, an injured employee had been paid an advance for living expenses pending a determination of the extent of his injuries and in consideration had agreed to sue only after an effort to settle in good faith had been made and failed and the advance had been returned. He nevertheless brought suit under the FELA without making restitution. It was held that his failure was no defense to the suit since the contract was void.

The purpose of the FELA is to promote liberal recovery for railroad workers who are injured in the course of employment. An injured railroad worker often has no other source of livelihood than his labor and is often in a disadvantaged bargaining position. However, the ADEA protects a different class of employees, many of whom are "highly paid and capable of securing legal assistance without difficulty." *Runyan v. National Cash Register Corp.*, 787 F.2d 1039, 1043 (6th Cir. 1986) cert. denied 479 U.S. 850, 107 S.Ct. 178, 93 L.Ed.2d 114 (1986); *O'Hare v. Global Natural Resources, Inc.*, 898 F.2d 1015 (5th Cir. 1990).

The analogy to the FELA is not sound. The FELA concerns injured railroad workers. The Congressional purpose expressed in the FELA was to provide liberal recovery for injured workers. The injured workers' cause of action under the FELA is the common law cause of action for negligence. The FELA stripped the employer of common law defenses. On the other hand, the purpose of the ADEA, as expressed in the statute, is to promote employment of older persons based on their ability. The ADEA creates a wholly new right of

recovery which did not exist in common law. There is no expression of Congressional intent under the ADEA to promote liberal recovery for older workers. The analogy to the FELA is not sound. The rule of *Hogue v. Southern R. Co.*, 390 U.S. 516, 88 S.Ct. 1150, 20 L.Ed.2d 73 (1968) (per curiam) under the FELA does not apply to the ADEA.

Applying the Common Law Principle of Ratification to Releases of Claims Under the ADEA Serves the Public Policy of Settlement of Claims Without Litigation

Public policy favors voluntary settlement of claims and enforcement of releases. *Rogers v. General Elect. Co.*, 781 F.2d 452, 454 (5th Cir. 1986); *Williams v. Phillips Petroleum Co.*, 23 F.3d 930, 935 (5th Cir. 1994), cert. denied, 115 S.Ct. 582, 130 L.Ed.2d 497 (1994). The rule that retention of the severance benefits ratifies the release serves a valid public purpose, namely encouraging the settlement of ADEA claims without litigation. The simplest and easiest way to fulfill this purpose is to give effect to the private agreements of the parties. *Wamsley v. Champlin Refining and Chemicals, Inc.*, 11 F.3d 534, 539 (5th Cir. 1993) cert. denied, 115 S.Ct. 1403, 131 L.Ed.2d. 290 (1995).

The facts of *Wamsley* illustrate why the contrary rule would defeat this purpose. In *Wamsley*, no challenge was made to the language of the release and both sides agreed that the release was in letter perfect compliance with 29 U.S.C. § 626(f)(1). Wamsley and the other plaintiffs alleged that they were told by employees of Champlin that they had to sign and return the release by their termination date, less than forty five days after receiving the notice. The nature of their attack on the releases insured that they would have a fact issue which would preclude a summary judgment, but for the doctrine of ratification. *Wamsley*, 11 F.3d at note 9, p. 539. But for the

doctrine of ratification, employees who sign releases which perfectly comply with 29 U.S.C. § 626(f)(1) could obtain a trial on the merits to determine the validity of the release while retaining the severance benefits.

Furthermore, employers would have no confidence that they could rely on written releases of ADEA claims and would be less inclined to pay severance benefits. As the Seventh Circuit pointed out,

> Not even plaintiffs are helped in the long run by a rule allowing them to have their cake and eat it, for a defendant will not pay as much for a release that the plaintiff can challenge without having to repay the money as the price of maintaining the challenge.

Fleming v. U.S. Postal Service AMF O'Hare, 27 F.3d 259, 261 (7th Cir. 1994), cert. denied, 115 S.Ct. 741, 130 L.Ed.2d 642 (1995).

2. ERROR, IF ANY, WAS HARMLESS BECAUSE THE RELEASE FULLY COMPLIES WITH THE OWBPA

The Release which Blakeney signed fully satisfies all of the requirements of 28 U.S.C. § 626(f)(1) clauses (A) through (H) and is not defective in any particular.

Clause (A) of § 626(f)(1) requires that the agreement be written in a manner calculated to be understood by such individual, or by the average individual eligible to participate. The Release is entitled "Settlement Agreement and General Release" and contains a very broad description of claims released. It could not be understood to be anything other than

a general release.

Blakeney argued that the Release does not meet this requirement because, there is an ambiguity between the language of the Third and Eighth paragraphs as to whether the Release applies to claims arising in the future. The District Court correctly concluded that the Release was not ambiguous and that the specific language of the eighth paragraph controlled over the more general language of the third paragraph. The language of the Third paragraph is intended to define and describe the claims released in the broadest possible fashion. The Eighth paragraph plainly states "Notwithstanding any of the above, Employee is not waiving any rights to claims that may arise after the date of the execution of this Agreement." The words "Notwithstanding any of the above..." expressly supersede and overrule any contrary intent contained in the Third paragraph. Under the ordinary rules for the construction of contracts, the Eighth paragraph controls over anything to the contrary in the Third paragraph. The Release is susceptible of only one interpretation and is not ambiguous and expressly does not apply to future claims. The Release could not be understood to be anything other than a general release.

Blakeney's deposition testimony was that he did not understand the Release simply because he glanced over it but did not read it fully before he signed it, notwithstanding that he had the opportunity to do so. Blakeney's testimony did not show that he was, in fact, confused by the Release or did not understand it to be a general release. A party who signs a written instrument is presumed to know its contents, and he cannot avoid the obligations which may be imposed on him by that instrument merely upon a showing that he had not read it, or that he had not had it read and explained to him, or that he did not understand its provisions. *Hicks v. Ocean Drilling and*

Exploration Company, 512 S.W.2d 817, 825 (5th Cir. 1975) cert. denied, 423 U.S. 1050, 96 S.Ct. 777, 46 L.Ed.2d 639 (1976).

The Release is entitled "Settlement Agreement and General Release" and contains a very broad description of claims released. It could not be understood to be anything other than a general release.

Clause (B) of § 626(f)(1) requires that the waiver specifically refer to rights or claims arising under the ADEA. The Third paragraph of the Release expressly does so.

Clause (C) of § 626(f)(1) requires that the waiver not waive rights or claims that may arise after the date the waiver is executed. The Eighth paragraph of the Release expressly provides:

> EIGHTH: Notwithstanding any of the above, Employee is not waiving any rights or claims that may arise after the date of the execution of this Agreement by Employee.

Clause (D) of § 626(f)(1) requires that the waiver be given only in exchange for consideration in addition to anything of value to which the individual already is entitled. Blakeney was paid severance benefits of $11,000 that he was not otherwise entitled to, which constitutes sufficient consideration for the Release. *O'Hare v. Global Natural Resources, Inc.*, 898 F.2d 1015, 1017 (5th Cir. 1990).

Clause (E) of § 626(f)(1) requires that the individual be advised in writing to consult with an attorney prior to executing the waiver. This is found in the Second paragraph of the Release which states:

> SECOND: The Employee represents and agrees that he fully understands his right to discuss all aspects of this Agreement with his private attorney, to the extent, if any, that he desires he has availed himself of this right, that he has carefully read and fully understands all of the provisions of this Agreement and that he is voluntarily entering into this Agreement.

Blakeney argues that the statute requires that Blakeney be "advised" to consult with his private attorney, whereas in the Release Blakeney "...represents and agrees that he fully understands his right to discuss all aspects of this Agreement with his private attorney, to the extent, if any, that he desires he has availed himself of this right,..." This is no more than a quibble. Clause (E) of 29 U.S.C. § 626(f)(1) does not require magic words which must be recited verbatim. "Understanding his right" to consult with his attorney is equivalent to being "advised" to consult with his attorney. The plain meaning of these words is a representation by Blakeney that he has been advised to consult with his private attorney. Blakeney has cited no authority to support his contention that the chosen language is ineffective or invalidates the Release.

Clause (F) of § 626(f)(1) requires that the individual be given a period of at least 21 days within which to consider the agreement. The final paragraph of the Release states in bold:

> YOU SHOULD TAKE AT LEAST TWENTY-ONE (21) DAYS FROM RECEIPT OF THIS AGREEMENT TO CONSIDER ITS TERMS BEFORE SIGNING IT."

Blakeney was not told that he had to sign the Release by any particular date and was not pressured to sign the Release

without waiting the twenty–one day period by anything other than the fact that he wanted the money.

Clause (G) of § 626(f)(1) requires that the agreement provide that for a period of at least 7 days following the execution of the agreement, the individual may revoke the agreement, and the agreement shall not become effective or enforceable until the revocation period has expired. The Eighth paragraph of the Release expressly provides:

> Moreover, for seven (7) days following the execution of the Agreement, Employee may revoke the Agreement, and the Agreement shall not become effective or enforceable until this seven (7) day revocation period has expired.

Clause (H) of 29 U.S.C. § 626(f)(1) concerns exit incentive programs and is not applicable to this case. No exit incentive was offered to Mike Blakeney.

The Release fully complies with all the requirements of 28 U.S.C. § 626(f)(1) and is not defective in any particular.

3. THE ALLEGED CIRCUIT CONFLICT IS NOT APPROPRIATE FOR REVIEW AT THIS TIME

Blakeney argues that this Court should grant certiorari to resolve an alleged split between the Fifth Circuit decisions in *Wamsley v. Champlin Refining and Chemicals, Inc.*, 11 F.3d 534 (5th Cir. 1993), rehearing en Banc denied, 37 F.3d 634, cert. denied, 115 S.Ct. 1403, 131 L.Ed.2d 290 (1995), and *Wittorf v. Shell Oil Company*, 37 F.3d 1151 (5th Cir. 1994) and the Seventh Circuit decision in *Oberg v. Allied Van Lines, Inc.*, 11 F.3d 679 (7th Cir. 1993), cert denied, 114 S.Ct. 2104, 128

L.Ed.2nd 665 (1994). In *Oberg*, the Seventh Circuit held that an ADEA plaintiff need not tender back the severance benefits paid to him for an allegedly invalid release in order to proceed with a lawsuit under the ADEA. This Court declined to accept certiorari in both *Wamsley* and *Oberg*.

Ordinarily, this Court does not seek to resolve a split of authority until several of the Circuit Courts of Appeals have addressed the question at issue. This Court has followed the salutary policy of allowing conflicts in the circuits to go unaddressed until more than two courts of appeal have considered a question. This allows a period of exploratory consideration and experimentation by lower courts before this Court ends the process with a nationally binding rule. *McCray v. New York*, 461 U.S. 961, 103 S.Ct. 2438, 77 L.Ed.2d 1322 (1983) (J. Stephens dissenting); *United States v. Mendoza*, 464 U.S. 154, 160, 104 S.Ct. 568, 78 L.Ed.2d. 379 (1984).

Cases are presently pending before the Fourth and Sixth Circuits involving the issue of whether a release of ADEA claims is ratified by retention of severance benefits. These are *Blistien v. St. John's College*, No. 94-2223 (4th Cir.) and *Raczak v. Ameritech Corp.*, No. 93-CV-72697-DT (6th Cir.).

Furthermore, the Seventh Circuit in a recent case has indicated a possible retreat from the position taken in *Oberg*. In *Fleming v. U.S. Postal Service AMF O'Hare*, 27 F.3d 259, 261 (7th Cir. 1994), cert. denied, 115 S.Ct. 741, 130 L.Ed.2d 642 (1995), a different panel of the Seventh Circuit noted that the opinion in *Oberg* was strongly criticized in *Wamsley*. The court stated, with respect to *Forbus* and *Oberg*, "The idea behind these cases...is a little obscure to us." *Fleming v. U.S. Postal Service AMF O'Hare*, 27 F.3d 259, 261 (7th Cir. 1994), cert. denied, 115 S.Ct. 741, 130 L.Ed.2d 642 (1995). There is a question as to whether *Oberg* will survive within its own

circuit.

No opinions on the issue have been handed down by any court since certiorari was denied in *Wamsley* in May of this year. The reasons for denying certiorari in *Wamsley* are equally applicable to this case.

Blakeney has offered no reason why this Court should not wait for the benefit of decisions by other Circuit Courts of Appeals.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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713-626-1200
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June 1995

Counsel for Respondent

APPENDIX

SETTLEMENT AGREEMENT AND GENERAL RELEASE

THIS SETTLEMENT AGREEMENT AND GENERAL RELEASE (the "Agreement") is made and entered into by and between Michael Blakeney hereinafter referred to as "Employee") and BAKER HUGHES INCORPORATED and its subsidiaries and affiliates (hereinafter referred to as the "Company").

W I T N E S S E T H:

WHEREAS, the Employee's active service with the Company has or will terminate; and

WHEREAS, the Company has offered certain benefits to the Employee under the provisions of the Company's Severance Policy (the "Policy") and the attendant Letter of Explanation (the "Letter") as consideration to the Employee to enter into this Agreement.

WHEREAS, the Employee and the Company desire to settle fully and finally all differences between them, including, but in no way limited to, any differences that might arise out of Employee's employment with the Company and the termination thereof;

NOW, THEREFORE, in consideration of the premises and mutual promises herein contained and in conjunction with the Policy and the Letter, it is agreed as follows:

FIRST: This Agreement shall not in any way be construed as an admission by the Company that it has acted wrongfully with respect to the Employee or any other person, or that the Employee has any rights whatsoever against the

Company, and the Company specifically disclaims any liability to or wrongful acts against the Employee or any other person, on the part of itself, its employee or its agents.

SECOND: The Employee represents and agrees that he fully understands his right to discuss all aspects of this Agreement with his private attorney, to the extent, if any, that he desires he has availed himself of this right, that he has carefully read and fully understands all of the provisions of this Agreement and that he is voluntarily entering into this Agreement.

THIRD: As a material inducement to the Company to enter into this Agreement, the Employee hereby irrevocably and unconditionally releases, acquits and forever discharges the Company and each of the Company's owners, stockholders, predecessors, successors, assigns, agents, directors, officers, employees, representatives, and attorneys of such divisions, subsidiaries, affiliates (and agents, directors, officers, employees, representatives and attorneys of such divisions, and subsidiaries and affiliates), and all persons acting by, through, under or in concert with any of them (collectively "Releasees"), or any of them, from any and all charges, complaints, claims, liabilities, obligations, promises, agreements, controversies, damages, actions, causes of action, suits, rights, demands, costs, losses, debts and expenses (including attorneys' fees and costs actually incurred) of any nature whatsoever, known or unknown, suspected or unsuspected, including, but not limited to, rights arising out of alleged violations of any contracts, express or implied, any covenant of good faith and fail dealing, express or implied, or any tort, or any legal restrictions on the Company's right to terminate employees, or any federal, state or other governmental statute, regulation, or ordinance, including, without limitation, Title VII of the Civil Rights Act of 1964 and the Federal Age Discrimination in Employment

Act, which the Employee now has, owns or holds, or claims to have, own or hold, or which the Employee at any time heretofore, had, owned or held, or claimed to have, own or hold, or which Employee at any time hereinafter may have, own or hold, or claim to have, own or hold against each or any of the Releasees. In addition, the Employee waives all rights and benefits afforded by any state laws which provide in substance that a general release does not extend to claims which a person does not know or suspect to exist in his favor at the time of executing the release which, if known by him, must have materially affected his settlement with the other person. The only exception to the foregoing shall be claims for wages and benefits specifically promised under the Policy and the Letter.

FOURTH: The Employee represents and acknowledges that in executing this Agreement he does not rely and has not relied upon any representation or statement, oral or written, not set forth herein made by any of the Releasees or by any of the Releasees' agents, representatives or attorneys with regard to the subject matter, basis or effect of this Agreement or otherwise.

FIFTH: This Agreement, the Policy and the Letter sets forth the entire agreement between the parties hereto, and fully supersedes any and all prior agreements or understandings, oral or written, between the parties hereto pertaining to the subject matter hereof.

SIXTH: This Agreement, the Policy and the Letter shall be construed and interpreted in accordance with the laws of the State of Texas with venue for litigation being in Houston, Texas.

SEVENTH: The invalidity or unenforceability of a term

of provision(s) of this Agreement shall not affect the validity or enforceability of any other term or provision of this Agreement, which shall remain in full force and effect.

EIGHTH: Notwithstanding any of the above, Employee is not waiving any rights or claims that may arise after the date of the execution of this Agreement by Employee. Moreover, for seven (7) days following the execution of the Agreement, Employee may revoke the Agreement, and the Agreement shall not become effective or enforceable until this seven (7) day revocation period has expired.

PLEASE READ CAREFULLY, THIS AGREEMENT INCLUDES A RELEASE OF ALL KNOWN AND UNKNOWN CLAIMS. YOU SHOULD TAKE AT LEAST TWENTY-ONE (21) DAYS FROM RECEIPT OF THIS AGREEMENT TO CONSIDER ITS TERMS BEFORE SIGNING IT.

EXECUTED AT Houston (city), Texas (state), this 7 day of APRIL, 1992.

/S/ Michael Blakeney
Name

Michael Blakeney
Name Printed

EXECUTED at Houston (city), Texas (state), this 8th day of April 1992.

BAKER HUGHES INCORPORATED

/S/ M. R. Walker
By

Michael R. Walker
Name Printed